No. 87-617

In The
Supreme Court of the United States
October Term, 1987

EDDIE D. LOONEY,

Petitioner,

v.

GRUNDY NATIONAL BANK,
JO S. WIDENER, TRUSTEE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a bankruptcy judge may enter an injunction which purports to continue the automatic stay of Bankruptcy Code Section 362 and says that notice of the injunction is deemed notice and opportunity for a hearing upon plaintiff's motion for relief from the automatic stay when, in fact, there has been no notice and no opportunity for a hearing?

2. Whether the bankruptcy judge may ignore the requirements of 11 U.S.C. Section 362(e) by indefinitely continuing the automatic stay by an injunction issued without notice or opportunity for a hearing while setting a hearing on the motion for relief from the stay more than 30 days after the request for relief from the stay?

3. Whether the indefinite continuance of the automatic stay by an injunction of the bankruptcy court without notice or opportunity for a hearing pending a hearing more than 30 days from the date of the request for relief from the automatic stay is a violation of F.R.Civ.P. 65, a violation of Section 362(e), and a violation of due process of law?

4. Whether the district court's order upholding the bankruptcy court's injunction indefinitely continuing the automatic stay without granting notice or opportunity for a hearing to the secured creditor is an appealable order under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, an appealable order under the *Forgay v. Conrad* doctrine, or an appealable order under 28 U.S.C. Section 1292(a)?

5. Whether the phrase "after notice and a hearing" in Section 362(e) may be interpreted to mean no notice and no hearing or whether it requires notice and opportunity for a hearing as are reasonable under the circumstances?

LIST OF PARTIES

Eddie D. Looney, Jo S. Widener, Trustee, and Grundy National Bank are the parties to this appeal. Upon information and belief Grundy National Bank says that Judy Looney died sometime during the pendency of this case. Grundy National Bank has no parent companies, subsidiaries, or affiliates.

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Respondent, Grundy National Bank ("Grundy"), respectfully requests that this Court deny Eddie D. Looney's petition seeking a writ of certiorari for review of the Fourth Circuit's decision in this case.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

In addition to those set out by petitioner, Grundy National Bank would like to add the following:

(1) BANKRUPTCY RULE 7065. INJUNCTIONS.

Rule 65 F.R.Civ.P. applies in adversary proceedings, except that a temporary restraining order or preliminary injunction may be issued on application of a debtor, trustee, or debtor in possession without compliance with Rule 65(c).

(2) F.R.Civ.P. 65(a)(1) PRELIMINARY INJUNCTION.

No preliminary injunction shall be issued without notice to the adverse party.

(3) F.R.Civ.P. 65(b) TEMPORARY RESTRAINING ORDER; NOTICE; HEARING; DURATION.

A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period.

The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedent of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(4) F.R.Civ.P. 65(d) FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER.

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

(5) 11 U.S.C. SECTION 362(a) (in pertinent part):

Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under Section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee (a)(3)), operates as a stay, applicable to all entities, of—

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding

against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

* * *

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

* * *

STATEMENT OF THE CASE

This case arose when Grundy National Bank (Grundy), a secured creditor, filed a motion for relief from the automatic stay of 11 U.S.C. Section 362(a) in the Chapter 13 bankruptcy proceeding of debtors Eddie and Judy Looney. The bankruptcy court, without giving notice or opportunity for a hearing to Grundy in violation of 11 U.S.C. Section 362(e), entered an injunction indefinitely continuing the automatic stay; the bankruptcy court's injunction did not comply with the requirements of F.R.Civ.P.

65. The district court affirmed the bankruptcy court's injunction.

On June 18, 1986, the Looneys filed a Chapter 13 bankruptcy petition and the bankruptcy clerk entered an order for relief. On July 7, 1986, Grundy filed a Motion for Relief from Stay asking that the automatic stay imposed by Bankruptcy Code Section 362 be lifted to allow it to proceed under state law against the debtors' principal residence, a 1982 F-150 pick-up truck, and a 1976 Ford truck, all of which were security for loans made by Grundy National Bank to the Looneys. These loans were in default. The secured property was and is rapidly deteriorating in value. During the pendency of this appeal the debtor's principal residence was destroyed by fire. Debtor Eddie Looney remains in possession of the two trucks.

On July 22, 1986, without notice to Grundy National Bank and without providing Grundy an opportunity for a hearing, the bankruptcy court, sua sponte, issued an injunction indefinitely continuing the automatic stay pending a hearing on the merits of the case. This was a form injunction used by this bankruptcy judge in every case before him of a Motion for Relief from Stay. A notice dated the same day and signed by a deputy bankruptcy clerk stated that a hearing on the Motion for Relief from Stay would be held on September 11, 1986, a date 66 days after the date the Motion for Relief from Stay was filed.

The bankruptcy court did not make any findings of fact. No hearing was ever held. Neither the debtors nor the trustee made any requests for the extraordinary relief which was granted. This bankruptcy judge routinely continues the automatic stay indefinitely; Grundy had no

guarantee that the hearing set for September 11, 1986, would result in relief from the automatic stay or adequate protection. The practice of this bankruptcy judge is to grant continuance after continuance without lifting the stay or requiring the payment of any adequate protection. Grundy had to either submit to this process of injunction by continuance or appeal within ten days of the date of the order, pursuant to Bankruptcy Rule 8002. The bank chose to appeal.

On appeal, counsel for the debtors admitted in oral argument before the district judge that the bankruptcy court had continued the stay without an actual hearing or actual notice to Grundy. See District Court's memorandum opinion reprinted in Petition for Writ of Certiorari, at 43. The district court miscalculated the length of the stay extension to be only 4 days and then decided that an extension of only 4 days without notice or hearing was "appropriate". *Grundy National Bank v. Looney,* 823 F.2d 788, 790, fn1, (4th Cir. 1987) reprinted in Petition for Writ of Certiorari, at 20. The district court's decision confused the requirements of Sections 362(d) and 362(e) and ignored the requirement of 362(e) that there must be a finding of a reasonable likelihood that the party opposing relief from the stay will prevail before the stay may be continued. See District Court's memorandum opinion, at 4, reprinted in Petition for Writ of Certiorari, at 43.

The Fourth Circuit Court of Appeals was faced with two questions: Did it have jurisdiction to review the district court's order upholding the bankruptcy court's injunction? Was the notice and hearing requirement of Section 362(e) met or, alternatively, was the bankruptcy court's action proper as an exercise of its equitable pow-

ers under F.R.Civ.P. 65 and Section 105(a) of the Bankruptcy Code? The Fourth Circuit Court of Appeals held that the district court's order was appealable under the collateral order doctrine enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) because the bankruptcy court's injunction had conclusively determined Grundy's statutory right to have the automatic stay lifted, unless the Looneys showed a reasonable likelihood of prevailing on the merits, within 30 days of the filing of Grundy's motion for relief; denial of review would render impossible any review whatsoever.

On reaching the merits, the Fourth Circuit reversed the district court and held that the statutory procedure under 11 U.S.C. Section 362 requires some sort of notice and opportunity for a hearing be given Grundy, that Section 362(e) had been enacted to prevent the old Bankruptcy Act practice of "injunction by continuance", that the bankruptcy court could not deny Grundy's motion, sua sponte, without notice or determination of the likely outcome of the case or without conformity with the other requirements of F.R.Civ.P. 65 and that the bankruptcy court's injunction indefinitely continuing the automatic stay could not be justified under the bankruptcy court's general equitable powers.

The Fourth Circuit Court of Appeals specifically condemned the bankruptcy court's practice of routinely granting continuances of the automatic stay without providing notice or hearing or making any determination that the party opposing the motion is reasonably likely to prevail on the merits.

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SUMMARY OF ARGUMENT

The injunction issued by the bankruptcy court, sua sponte, without giving notice or opportunity for a hearing to Grundy National Bank contravenes F.R.Civ.P. 65, Bankruptcy Code Section 362(e), and due process. Congress specifically outlawed the old Bankruptcy Act practice of "injunction by continuance" which the bankruptcy court and district court orders sought to allow.

"After notice and a hearing" does not mean no notice and no hearing. It requires such notice and such opportunity for a hearing as is appropriate in the particular circumstances.

The district court's order, though not final, was appealable under the *Cohen* collateral order doctrine because it conclusively determined the disputed question and resolved an important issue completely separate from the merits of the action, that was effectively unreviewable on appeal from a final judgment. It was appealable under the *Forgay v. Conrad* doctrine because Section 362(e) was a legislative finding of irreparable harm. The district court's order was also appealable under the plain language of 28 U.S.C. Section 1292(a) which grants to courts of appeals jurisdiction to hear appeals of interlocutory orders of the district courts continuing, or refusing to dissolve or modify, injunctions.

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ARGUMENT

I. SECTION 362(e) TERMINATES THE AUTOMATIC STAY UNLESS A HEARING IS HELD WITHIN THIRTY DAYS

The filing of a bankruptcy petition operates as a stay against any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate or any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case. 11 U.S.C. Section 362(a)(3) and (5). 362(e) terminates the automatic stay imposed by Section 362(a) unless a hearing is held within thirty days after the filing of a request for relief from the stay. The court may, after notice and a hearing, order the stay continued in effect pending the conclusion of the final hearing and determination under 362(d) if the court finds that there is a reasonable likelihood that the party opposing relief from the stay will prevail at the conclusion of the final hearing. The complete language of 11 U.S.C. Section 362(e) is:

> Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay

> continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.

Bankruptcy Code Section 362(d) provides:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if—
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective reorganization.

On July 7, 1986, Grundy filed a Motion for Relief from Stay. Under 362(e) the automatic stay would have been lifted on August 6, 1986, unless a hearing was held. The debtors did not file a request that a hearing be held. However, on July 22, 1986, the bankruptcy court, on its own motion, issued an injunction indefinitely continuing the automatic stay pending a hearing on the merits of the case. This injunction was issued without notice to Grundy and without providing Grundy an opportunity for a hearing. A hearing was set for September 11, 1986,

sixty-six days after the filing of the Motion for Relief from Stay and thirty-six days after the stay should have lifted under Section 362(e).[1]

The bankruptcy injunction appealed from stated:

> For good cause shown, it is ORDERED that the stay shall remain in effect pending a hearing on the merits of the within case.
>
> Service of a copy of this ORDER shall be made by mail this date to counsel for the Movant(s), counsel for the Respondent(s), if known, the Debtor(s), and to the Trustee, if applicable, and notice of this Order is deemed notice and opportunity for a hearing under Section 102.

The bankruptcy court entered this injunction without any prior notice and without any hearing. In fact, this was a form injunction which the bankruptcy court used in *every* case. Grundy asked the district court and the circuit court to take judicial notice that this was a form injunction used in every case before this bankruptcy judge involving a motion for relief from the automatic stay and that this judge habitually continued the stay without requiring adequate protection. Grundy asks that this court take judicial notice of these facts which were admitted by appellant's counsel during oral argument before the district court and before the circuit court.

362(e) was enacted to prevent the practice that had arisen under the old Bankruptcy Act of "injunction by continuance". The legislative history is explicit:

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[1] The district court mistakenly stated in its opinion that there was an extension of only four days. The circuit court noted this mistake and instructed that on remand careful attention be paid to the actual filing date. *Grundy National Bank v. Looney*, 823 F.2d 788, 790, fn.1 (4th Cir. 1987).

Subsection (e) provides protection that is not always available under present law. The subsection sets a time certain within which the bankruptcy court must rule on the adequacy of protection provided for the secured creditor's interest. If the court does not rule within 30 days from a request by motion for relief from the stay, the stay is automatically terminated with respect to the property in question. To accommodate more complex cases, the subsection permits the court to make a preliminary ruling after a preliminary hearing. After a preliminary hearing, the court may continue the stay only if there is a reasonable likelihood that the party opposing relief from the stay will prevail at the final hearing. Because the stay is essentially an injunction, the three stages of the stay may be analogized to the three stages of an injunction. The filing of the petition which gives rise to the automatic stay is similar to a temporary restraining order. The preliminary hearing is similar to the hearing on a preliminary injunction, and the final hearing and order are similar to the hearing and issuance or denial of a permanent injunction. The main difference lies in which party must bring the issue before the court. While in the injunction setting, the parties seeking the injunction must prosecute the action, in proceedings for relief from the automatic stay, the enjoined party must move. The difference does not, however, shift the burden of proof. Subsection (g) leaves that burden on the party opposing relief from the stay (that is, on the party seeking continuance of the injunction) on the issue of adequate protection and existence of an equity. It is not, however, intended to be confined strictly to the constitutional requirement. This section and the concept of adequate protection are based as much on policy grounds as on constitutional grounds. Secured creditors should not be deprived of the benefit of their bargain. . . . [T]he purpose of the section is to insure that the secured creditor receives the value for which he bargained.

S. Rep. No. 989, 95th Cong., 2d. Sess. 53, reprinted in *1978 U.S. Code Cong. & Ad. News* 5787, 5839.

It was anticipated by Congress that final hearings under Section 362(e) would be given priority on the bankruptcy court's calendar. See 124 Cong. Rec. H. 11092, H. 11093 (September 28, 1978).

In this case the bankruptcy court held no hearing and never made a finding that there was a reasonable likelihood that the party opposing relief from the stay would prevail at a final hearing. Rather, the court entered an injunction which purported to continue the automatic stay of Section 362 and set a hearing for a date sixty-six days after the filing of the motion for relief from the automatic stay. The most serious result of the bankruptcy court's procedure was that the debtor remained in possession of the secured property and made no adequate protection payments whatsoever. Grundy National Bank did not receive the benefit of its bargain. In fact, the debtor is still in possession of the secured property. Even though the circuit court and the district court have issued mandates reversing the bankruptcy court's injunction and no stay of those mandates has been applied for, the bankrutpcy court has taken no action to lift its injunction.

According to 6 *Collier on Bankruptcy,* Section XI-175 (1986), "In essence, this subsection [362(e)] requires the court to rule, at least preliminarily, on the adequacy of protection provided for the secured creditor's interest within 30 days from the request for relief from the stay." Grundy has not been provided with a preliminary ruling on the adequacy of protection for its secured interest. This procedure of continuing an automatic stay without pro-

viding notice, opportunity for a hearing, or adequate protection, was used by this bankruptcy judge in every case before him. This process of "injunction by continuance" was exactly what Congress prohibited in Section 362(e).

The bankruptcy court order allowed the debtors to continue to use the secured property, which is depreciating in value, without making any payments to the secured creditor, Grundy. Congress recognized that this would have to be allowed for a short period of time until the debtors' affairs could be sorted out. However, Congress clearly limited this period to thirty days.

As every day goes by, the secured property depreciates in value and the amount of money which Grundy will be able to collect declines. The amount of the debt owed to Grundy in excess of the value of the secured property is an unsecured claim. 11 U.S.C. Section 506(a). Unsecured claims usually go unpaid. The effect of the bankruptcy court's injunction was to deprive Grundy of its property rights in the secured property without due process of law and in violation of the clear language of Section 362(e) and F.R.Civ.P. 65. Appropriately, the Fourth Circuit instructed the lower courts to stop this practice of "injunction by continuance".

II. THE PHRASE "AFTER NOTICE AND A HEARING" IN THIS CONTEXT DOES NOT MEAN NO NOTICE AND NO HEARING AND DOES NOT ALLOW THE STAY TO BE CONTINUED.

The bankruptcy court's order states that ". . . notice of this Order is deemed notice and opportunity for hearing under Section 102." It is undisputed that no hearing was

held before the entry of this order. The Statement of the Proceedings signed by the district judge without objection of the appellees, states "No hearing was held in the bankruptcy court on this matter. No evidence was produced by any party." Counsel for the appellees admitted this during oral arguments before the district court and the circuit court.

11 U.S.C. Section 102 states, in pertinent part:

> In this title—
>
> 1. "After notice and a hearing", or a similar phrase—
>
> (A) means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances; but
>
> (B) authorizes an *act* without an actual hearing if such notice is given properly and if—
>
> (i) such a hearing is not requested timely by a party in interest; or
>
> (ii) there is insufficient time for a hearing to be commenced before such *act* must be done, and the court authorizes such *act*.

(Emphasis added.)

The legislative history of Section 102(1) explains what "after notice and a hearing" means:

> Section 102(1) expands on a rule of construction contained in H.R. 8200 as passed by the House and in the Senate amendment. The phrase "after notice and a hearing", or a similar phrase, is intended to be construed according to the particular proceeding to mean after such notice as is appropriate in the particular circumstances, and such opportunity, if any, for a hearing as is appropriate in the particular circum-

> stances. If a provision of title II authorizes an act to be taken "after notice and a hearing" this means that *if appropriate notice is given* and no party to whom such notice is sent timely requests a hearing, then the act sought to be taken may be taken without an actual hearing.
>
> In very limited emergency circumstances, there will be insufficient time for a hearing to be commenced before an action must be taken. The action sought to be taken may be taken if authorized by the court at an ex parte hearing of which a record is made in open court. A full hearing after the fact will be available in such an instance.

(Emphasis added.) 124 Cong. Rec. H. 11089, H. 11090 (September 28, 1978).

The case at bar was not one of those "very limited emergency circumstances." There was no ex parte hearing. No record was made in open court. The hearing was set 66 days after the Motion for Relief from Stay was filed. No *act* was authorized.

Petitioners claim that the Fifth Circuit's decision in *In re River Hills Apartment Funds,* 813 F.2d 702 (1987) is contra to the Fourth Circuit's decision in this case. In *In re River Hills Apartment Funds,* the bankrutcy court had lifted the automatic stay for the limited purpose of allowing a secured creditor to post a notice of foreclosure. State law required that notice be posted 21 days before a foreclosure sale and that foreclosure notices could only be posted on the first Tuesday of each month. The bankruptcy court did not lift the automatic stay so as to allow the foreclosure. It only allowed the secured creditor to post the notice of foreclosure pending a hearing on a request for relief from the stay to allow the foreclosure to

proceed. The debtor did not oppose that limited relief or seek a hearing on the issue. Later, after the proceedings had been transferred from the bankruptcy court to the district court, the district court failed to hold a hearing within the 30-day period and the automatic stay expired. The Fifth Circuit noted that "the debtor must, through 'aggressive litigation management,' obtain a timely hearing if it wants to ensure the continued protection of the automatic stay." *In re River Hills,* at 707. Because the debtor had not called the issue to the district court's attention, the stay lifted automatically. A preliminary hearing had been held before the bankruptcy court, but that court had not continued the automatic stay in effect. The burden was on the debtor to seek a hearing before the district court.

Rather than being opposed to the Fourth Circuit's decision, *In re River Hills Apartment Funds* firmly supports the Fourth Circuit's decision that the 30-day death knell provision of Section 362(e) must be enforced. As the Fifth Circuit noted, the primary purpose of the definition of "after notice and a hearing" in Section 102 was to eliminate the direct involvement of the bankruptcy court in administrative matters absent a dispute. *In re River Hills,* at 706. The debtor in *In re River Hills* had failed to request a hearing. In this case, Grundy, a secured creditor, filed a motion for relief from the stay. The debtors did not request a hearing or the extraordinary relief which the bankruptcy court granted. Under the rationale of *In re River Hills Apartment Funds,* the stay in this case should have been allowed to terminate automatically on the thirtieth day.

Both *Looney* and *In re River Hills* say that the automatic stay terminates 30 days after a request for relief unless a hearing is held at the request of the party opposing relief and the court finds that the secured party is adequately protected or finds a reasonable likelihood that the party opposing relief will prevail at a final hearing if such a final hearing is necessary because of the complexity of the case. Both decisions put the burden on the party opposing relief, usually the debtor, to demand a timely hearing.

The petitioner claims that the bankruptcy docket for the Western District of Virginia is crowded and therefore the 30-day death knell provision of Section 362(e) should be ignored. To this argument the Fourth Circuit responded, "The Looneys contend that the bankruptcy docket for the Western District of Virginia is too crowded for one judge to serve it without bending the rules. There may be a need for more bankruptcy judges in the district, but this argument does not suffice to justify altering the procedure for lifting the automatic stay. The provisions governing relief from the automatic stay exist to protect secured creditors and it is not acceptable to ignore the rules because the court has a crowded docket. Congress clearly intended to limit the period following a motion to lift the automatic stay to thirty days, unless the bankruptcy court finds affirmatively that the debtor is likely to prevail in the end." *Looney*, 823 F.2d at 793.

During oral argument before the Fourth Circuit Court of Appeals, counsel for Grundy pointed out to the court that the statistics from the Administrative Office of the U.S. Courts published in the January 22, 1987 edition of

the Bankruptcy Court Decisions at A10, Table F1, U.S. District Courts, Bankruptcy Petitions Commenced, Terminated, and Pending During the Twelve Month Periods Ended June 30, 1985 and 1986, show that the Western District of Virginia had 2,918 bankruptcy filings in 1985 and 3,738 bankruptcy filings in 1986 compared to the Eastern District of Virginia which had 6,254 bankruptcy filings in 1985 and 8,359 bankruptcy filings in 1986. During those years, the Eastern District and the Western District each had three sitting bankruptcy judges. Thus, the Eastern District of Virginia was handling more than twice as many bankruptcy cases as the Western District of Virginia. Counsel for Grundy also pointed out that the Eastern District of Virginia has a Local Rule 4001 which specifically provides that all motions for relief from the stay will be governed by 11 U.S.C. Section 362(d) and (e). Counsel for Grundy also pointed out that this bankruptcy judge was the only bankruptcy judge in Virginia which resorted to this process of injunction by continuance. It should also be reported to this Court that in the aftermath of the Fourth Circuit's *Looney* decision the bankruptcy court in question has been reluctantly granting hearings on motions for relief from the stay within the 30-day period required by 362(e).

III. THE DISTRICT COURT'S ORDER IS AN APPEALABLE ORDER.

A. The Cohen Doctrine

The order of the district court affirming the bankruptcy court's injunction was not a final order because it did not resolve the litigation, decide the merits, settle liability, establish damages, or determine the rights of

even one of the parties to the bankruptcy case. *Looney,* 823 F.2d at 790. The court found that jurisdiction did lie under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). To be reviewable under the *Cohen* doctrine, an order "must conclusively determine the disputed question, solve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Looney,* 823 F.2d at 791 (citing *Coopers and Lybrand,* 437 U.S. at 468, 98 S.Ct. at 2457 (footnote omitted)). The Fourth Circuit determined that "the bankruptcy court order, issued without notice or a hearing, conclusively determined Grundy's statutory right to have the automatic stay lifted, unless the Looneys showed a reasonable likelihood of prevailing on the merits, within 30 days of the filing of Grundy's motion for relief. This right is an important protection for creditors of the value of collateral. A denial of review by this court 'would render impossible any review whatsoever,' *Firestone Tire and Rubber Co. v. Risjord,* 449 U.S. 368, 376, 101 S.Ct. 669, 674, 66 L.Ed. 2d 571 (1981), of the bankruptcy court's order." *Looney,* 823 F.2d at 791.

The 30-day death knell provision of Section 362(e) is an important creditor protection which would be lost if the order in question were not appealable. The petition for writ of certiorari in this case says that the order in question does not fit within the *Cohen* test because "the decision did not conclusively determine the real issue of whether the relief from stay should be granted." Petition for Writ of Certiorari, at 14. This is nonsense. If the decision conclusively determined the "real issue", it would

be a final order; the *Cohen* doctrine would not be in issue. The essence of the *Cohen* doctrine is that certain *collateral* orders which resolve important issues completely *separate* from the merits are appealable.

The petition for writ of certiorari claims that the Fourth Circuit's application of the collateral order doctrine in this case is in direct conflict with the Tenth Circuit's decision in *Evilsizor v. Eagle-Picher Industries, Inc.*, 725 F.2d 97 (10th Cir. 1984). See Petition for Certiorari at 8 and 13. In that case two defendants in two diversity suits sought injunctions staying actions against them after two other defendants filed bankruptcy and got the protection of the automatic stay. The Tenth Circuit dismissed the appeals for lack of jurisdiction because the order denying the injunction was fully reviewable after final judgment and thus did not involve "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Evilsizor,* at 99 (quoting *United States v. McDonald,* 435 U.S. at 860, 98 S.Ct. at 1552 (footnote omitted), citing also *Jesko v. United States,* 713 F.2d 565, 567-68 (10th Cir. 1983)).

Evilsizor is simply a case which does not satisfy the third prong of the *Cohen* test; the case at bar does. The legal and practical value of Grundy's right to a hearing or relief from the stay within 30 days would be destroyed if it could not be vindicated before trial. If the 30-day death knell provision of Section 362 cannot be vindicated before trial, then it is meaningless. When collateral is depreciating, time is of the essence.

B. Appealability Under Forgay v. Conrad

Closely related to the *Cohen* doctrine is the doctrine of *Forgay v. Conrad,* 47 U.S. (6 How.) 201 (1848), which permits appeals from interlocutory orders that dispose of substantive rights if the delay would result in irreparable injury. In *Forgay,* Chief Justice Taney opined for the Court that a liberal and reasonable construction of finality should be applied. The object of the final judgment rule was to save the unnecessary expense and delay of repeated appeals in the same suit; it should not be allowed to work an irreparable injury. Bankruptcy Code Section 362(e) is a legislative finding that secured creditors will suffer irreparable injury unless granted a hearing within 30 days. The district court's order in this case was appealable to the circuit court under the rationale of *Forgay v. Conrad.*

Traditionally, finality has been applied in a more pragmatic and less technical way in bankruptcy cases than in other cases. See *A.H. Robins Co., Inc., v. Piccinin,* 788 F.2d 994, 1009 (4th Cir. 1986).

"In bankruptcy cases, the only 'final order', if the order closing the case can meaningfully be called a final order, is relatively unimportant. . . . Waiting until the close of the case would effectively deny the right of appeal in important matters, just as waiting in *Cohen* or *Forgay* would have done." Levin, *Bankruptcy Appeals,* 58 N.C.L. Rev. 967, 983 (1980) (footnotes omitted).

C. Appealability Under 28 U.S.C. Section 1292(a)

28 U.S.C. Section 1292(a)(1) provides that courts of appeals have jurisdiction of appeals from interlocutory

orders of the district courts granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. The order of the district court in this case continued the bankruptcy court's injunction and refused to dissolve or modify that injunction. This order was appealable to the circuit court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari of Eddie D. Looney should be denied.

Respectfully submitted,

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